(1)

Supreme Court, U.S.
FILED

991944 MAY 30 2000

OFFICE OF THE CLERK

In The
Supreme Court of the United States

Summer Term, 2000

JERRY BLOOM
Petitioner,

vs.

JEWISH HOME FOR THE ELDERLY
OF FAIRFIELD COUNTY
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JERRY BLOOM
Petitioner Pro Se
135 Tunxis Road
Fairfield, CT 06430
203-367-0087

47 pp

QUESTIONS PRESENTED

1. Is there a conflict amongst the circuit courts whether it is permissible under *McDonnell Douglas Corp. v. Green* and its progeny, for a court to rely on the reasons given by the defendant for plaintiff's termination, in determining whether the plaintiff has established the second element of a prima facie case of discrimination?
2. Is it contrary to this Court's holdings in *McDonnell Douglas Corp. v. Green* and its progeny for a court to determine, when presented with evidence that someone outside the protected class was treated more favorably, that a discrimination plaintiff failed to satisfy the fourth element of a prima facie case; and for the court to draw its own inferences from the evidence to decide on a summary judgment motion that plaintiff failed to make out a prima facie case?

TABLE OF CONTENTS

Questions Presented	1
Table of Authorities	2
Opinions Below	5
Statement of Jurisdiction	5
Statement of the Case	6
Reasons for Granting the Writ	10
Issue #1	12
Issue #2	27
Conclusion	32
Appendices	-

TABLE OF AUTHORITIES

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....31

Bienkowski v. American Airlines, Inc., 851 F.2d 1053 (5th Cir. 1988).....15, 16

Bloom v. Jewish Home for the Elderly of Fairfield County, 44 F.Supp. 2d 439 (D.Conn. 1999).....5

Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 1999).....17

Davenport v. Riverview Gardens School District, 30 F.3d 940 (8th Cir. 1994).....20, 21, 22, 25

Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981).....18

Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) *cert. denied* 522 U.S. 1075 (1998).....29

Freeman v. Package Machine Co., 865 F.2d 1331 (1st Cir. 1988).....18

Hong v. Children's Memorial Hospital, 993 F.2d 1259 (7th Cir. 1993) *cert. denied*, 511 U.S. 1005 (1994).....25

Karpel v. Inova Health Publishing Inc., 134 F.3d 1222 (4th Cir. 1998).....20

MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115 (10th Cir. 1991).....14, 15

McDonnell Douglas Corp.v. Green, 411 U.S. 792 (1973).....10, 13, 18, 20, 26, 27, 29, 31

Miller v. Citizen's Security Group, Inc., 116 F.3d 343 (8th Cir. 1997).....22, 23, 25

Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493 (11th Cir. 1987).....18

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).....27

Siegel v. Alpha Wire Corp., 894 F.2d 50 (3d Cir.) *cert. denied*, 496 U.S. 906 (1988).....17

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).....27, 29, 31

Thornley v. Penton Publishing Inc., 104 F.3d 26 (2d Cir. 1997).....19

Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508 (7th Cir. 1986).....23, 24, 25

STATUTES:

28 U.S.C. Sect. 1254(1).....5

28 U.S.C. Sect. 1291.....7

42 U.S.C. Sect. 2000 *et seq*.....6

Fed. R. Civ. Pro. 56(e) – 1963 advisory committee notes 30

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported. (App. B). The opinion of the United States District Court for the District of Connecticut is reported at *Bloom v. Jewish Home for the Elderly of Fairfield County*, 44 F.Supp.2d 439 (D.Conn. 1999). (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 14, 2000, from which Bloom duly filed a Petition for Rehearing. The Petition for Rehearing was denied on March 2, 2000. (App. A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sect. 1254(1).

STATEMENT OF THE CASE

Petitioner Jerry Bloom (hereinafter "Bloom") seeks review of a decision by the United States Court of Appeals for the Second Circuit which affirmed the district court's granting of the Jewish Home for the Elderly's (hereinafter "Jewish Home" or "defendant") motion for summary judgment. The Second Circuit affirmed by substantially accepting the same reasons stated in the district court's ruling. Therefore, this petition will focus directly on the district court's ruling.

The district court exercised jurisdiction over this matter because all claims arose under Title VII of the Civil Rights Act of 1964, as amended and codified as 42 U.S. Sect. 2000 *et seq.*, with Bloom alleging he was terminated from his employment based on his sex and race.

The district court's ruling was rendered on April 6, 1999, in the United States District Court, District of

Connecticut, by the Honorable Warren Eginton. Final resolution of this action occurred when the district court granted defendant's motion for summary judgment on all of Bloom's claims on April 6, 1999 and final judgment was entered for the Jewish Home on April 8, 1999. On April 15, 1999 Bloom filed a Motion to Alter – Amend Summary Judgment and Reconsideration. The district court denied Bloom's motion on May 18, 1999, from which Bloom duly appealed to the Second Circuit by filing his Notice of Appeal on May 26, 1999. The Second Circuit had jurisdiction over his appeal pursuant to 28 U.S.C. Sect. 1291.

The facts relevant to this appeal are as follows. Bloom began working at the Jewish Home for the Elderly, on or about March 4, 1996 and was terminated on December 18, 1996. Bloom is a Registered Nurse licensed by the State of Connecticut. On December 17, 1996, Bloom was assigned to work on K-2, which is a "Skilled Nursing" floor. An epidemic of Upper

Respiratory-Tract Infections – U.R.I. had been declared in the (House). Allegedly there was a memo from the Medical Director posted at all the nursing stations in the House, informing the nursing staff that a new medication was to be administered to virtually all the patient population to check the spread and cure the U.R.I. epidemic. The medication Rimantadine was used for this purpose. Nine Patients under Bloom's care did not receive the prescribed medication, which arrived on his shift. These 9 patients survived the epidemic.

A method to safeguard against medication errors at the Jewish Home is to have the medication Kardex checked by the off going nurse at the end of the shift and to have the on coming nurse check it as well at the beginning of the shift. Although this was done on the evening of December 17 and 18, 1996, the medication omissions of Rimantadine were overlooked by Bloom and Kim Willis L.P.N. who relieved Bloom at approximately 11p.m. Although defendant states it was

not the night nurse's responsibility to administer the omitted medicine, the majority of the Rimandadine orders have the final instruction "WHEN AVAILABLE." Given the severity of the U.R.I. epidemic defendant contends existed it would be logical to assume therapy should begin as soon as possible. It was not until the Kardex had been checked at least 4 times and more than 12 hours had elapsed since the Rimantadine had been delivered that the omissions were discovered. Kim Willis likewise did not administer the prescribed Rimantadine, which had arrived, in a timely fashion. She was not terminated for these medication omissions, she is black and female and appears to have been treated differently than Bloom. Although a medication omission is considered a medication error, when Bloom requested all incident reports house wide pertaining to medication errors on December 17 and 18, 1996, he was told there were none. Additionally, there is no mention of the medication omissions and to the medication error

Kim Willis admitted to in her deposition in her personnel file.

The following afternoon, December 18th, Bloom was terminated by the defendant for failure to administer 9 doses of Rimantadine in a " timely fashion, and allegedly jeopardizing resident health and safety." The final performance evaluation he received before his termination Bloom was rated as performing in a satisfactory manner.

REAONS FOR GRANTING WRIT

This Court in *McDonnell Douglas v. Green* established the three-part burden shifting analysis now widely utilized by plaintiffs to assist them in proving their employment discrimination claims. This Court, also in *McDonnell Douglas*, laid out for the first time the four elements of a prima facie case of discrimination, which is the focus of the first part of the burden shifting analysis. Over time, the elements of the prima facie case

have evolved and varied, especially in order to adapt to the situation in which the discrimination arose, such as a denial of a promotion, a demotion, a discharge or a reduction in force. In this case, the district court required Bloom to satisfy the following elements in order to demonstrate a prima facie case of discrimination:

> (1) he belongs to a protected class;
>
> (2) he was performing his or her duties satisfactorily;
>
> (3) he suffered an adverse employment action; and
>
> (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination.

App. C at ~~3~~ 12A.

The district court granted the defendant's motion for summary judgment by ruling that Bloom failed to satisfy the second and fourth elements of the prima facie case. Bloom contends that the district court improperly

interpreted and placed an incorrect burden on him in order to satisfy the second and fourth elements of the prima facie case. These contentions form the bases of the two issues involved in this petition, and illustrate that there exists a conflict amongst the Circuits regarding the matters raised in issue one and that the Second Circuit Court of Appeals affirmed a ruling which conflicts with several decisions of this Court as presented herein as issue two.

Issue #1

As an integral part of its decision to grant defendant's motion for summary judgment, the district court ruled that "the undisputed evidence establishes that Mr. Bloom was not performing his job satisfactorily." App. C at 13a ~~7a-8a~~. This conclusion was based on the "undisputed facts" which "establish that Mr. Bloom [plaintiff] had serious performance problems concerning patient treatment and interaction with other staff. Mr. Bloom's termination arose out of his failure to correct his

13a

performance problems..." App. C at 7a. These passages from the ruling show that the district court obviously relied on the alleged reasons for Bloom's termination as given by the defendant, to determine that Bloom was not "performing his job satisfactorily" and thus failed to satisfy the second element of the prima facie case. Bloom contends that it was contrary to precedent and contrary to proper interpretations of this Court's prior rulings for the district court to defeat his ability to establish a prima facie case under *McDonnell Douglas* by relying on the defendant's reasons for taking the adverse employment action.

In keeping with this Court's prior decisions, the proper level of inquiry concerning the second element of the prima facie case was stated by the Tenth Circuit Court of Appeals when it held:

> Concluding that the [plaintiffs] did not establish a prima facie case based on the reasons for their discharge raises serious problems under the

McDonnell Douglas analysis, which mandates a full and fair opportunity for a plaintiff to demonstrate pretext. Short circuiting the analysis at the prima facie stage frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual...; if a plaintiff's failure to overcome the reasons for discharge defeats the plaintiff's prima facie case, the court is then not required to consider plaintiff's evidence on these critical issues.

McDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1119 (10th Cir. 1991).

The Tenth Circuit went on to hold:

> In setting out the evidence that suffices to meet this prong of a plaintiff's prima facie case, we are guided by the practice of this and other circuits, as well as by the principle that the prima facie case was never intended to be rigid mechanized, or ritualistic .... Accordingly, we concluded that

> a plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the **objective qualifications she held when she was hired ... or by her own testimony that her work was satisfactory even when disputed by her employer.**

McDonald, 941 F.2d at 1121(emphasis added).

Several Circuit Courts of Appeals have adopted a rule akin to the Tenth Circuit, in that they refuse to consider the reasons given by the defendant for the plaintiff's termination in determining whether the plaintiff has established a prima facie case.

The Firth Circuit Court of Appeals, in *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1505 (5th Cir. 1988) concluded that the approach which requires a plaintiff to prove "that he was performing his job at a level that met his employer's legitimate expectations" cannot be reconciled "with the Supreme Court's

attempts, in *McDonnell Douglas* and *Burdine*, to simplify presentation of an employment discrimination case." The court found that "placing the plaintiff's 'qualifications' in issue at both the prima facie case and pretext stages of a termination case is an unnecessary redundancy." *Id.* The Fifth Circuit concluded "a plaintiff challenging his termination can ordinarily establish a prima facie case of discrimination by showing that he continued to possess the necessary qualifications for his job at the time of termination." *Id.* at 1506.

The Third Circuit Court of Appeals has also rejected a defendant's attempt to defeat a plaintiff's prima facie case by relying on its proffered reasons for the discharge in question.

> This argument ... goes to the issue of whether the defendants have demonstrated a legitimate business reason for the discharge and whether [the plaintiff] can demonstrate that this reason is

> pretextual, not the critical question of whether [the plaintiff] made out a prima facie case.

Siegel v. Alpha Wire Corp., 894 F.2d 50, 54 (3d Cir.), *cert. denied*, 496 U.S. 906, 110 L.Ed. 2d 269, 110 S. Ct. 2588 (1988).

The Sixth Circuit Court of Appeals is in complete agreement with the Third, Fifth and Tenth Circuits when it recently held:

> Whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff. The district court clearly failed to do this, improperly conflating the distinct stages of the *McDonnell Douglas* inquiry.

Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 660-61 (6th Cir. 1999).

Several other circuits also follow the reasoning discussed above, in drawing a distinction of the level of analysis of the prima facie and pretext stages of *McDonnell Douglas*. *See e.g.*, *Freeman v. Package Machine Co.*, 865 F.2d 1331, 1335-36 (1st Cir. 1988)(looking only at plaintiff's evidence that he was qualified for prima facie purposes, and considering defendant's evidence to the contrary at the rebuttal stage); *Douglas v. Anderson*, 656 F.2d 528, 533 n.5 (9th Cir. 1981)(considering a defendant's evidence of unsatisfactory job performance as its production, and not at the prima facie stage); *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1495 n.2 (11th Cir. 1987)(stating that "any disagreement between parties regarding whether a particular plaintiff was adequately performing his job" belongs at the later stages of *McDonnell Douglas*).

However, at least two circuits permit the use of the reasons proffered by defendant for the discharge to

defeat plaintiff's ability to satisfy element two of the prima facie case. For example, the Second Circuit Court of Appeals in *Thornley v. Penton Publishing Inc.*, 104 F.3d 26 (2d Cir. 1997) stated:

> The Supreme Court specified in *McDonnell Douglas Corp. v. Green* that the prima facie case in an employment discrimination suit includes a showing that the plaintiff was "qualified" for the position ... [I]n case of allegedly discriminatory discharge, we have occasionally analyzed this element in terms of whether plaintiff shows 'satisfactory job performance' at the time of discharge. Whether job performance was satisfactory depends on the employer's criteria for the performance of the job – not the standards that may seem unreasonable to the jury or judge.

Thornley, 104 F.3d 26, 29 (internal citations omitted). The decision in *Thornley* can be interpreted to mean that all an employer must do to prevail on a summary

judgment motion is show that based on its subjective criteria the employee's performance was unsatisfactory, and thus the plaintiff is unable to satisfy the second element of the prima facie case. Moreover, the defendant will prevail even if the plaintiff has evidence that his termination occurred under circumstances giving rise to an inference of discrimination. This is certainly contrary to the principles of *McDonnell Douglas*. *See also Karpel v. Inova Health System Services*, 134 F.3d 1222, 1228 (4th Cir. 1998)(plaintiff failed to make a prima facie showing of discrimination "[b] ecause the record clearly demonstrates the [plaintiff's] job performance was unsatisfactory, we are also unable to infer discriminatory intent under the *McDonnell Douglas* scheme").

Furthermore, it appears that two circuits are internally split on this issue. In 1994 the Eighth Circuit addressed issues pertaining to the second element of the prima facie case in a discriminatory discharge action. *Davenport v. Riverview Gardens School District*, 30 F.3d

940 (8th Cir. 1994). The case was before the Eighth Circuit because the district court granted defendant's motion for summary judgment by taking into consideration defendant's reasons for discharge when it concluded that plaintiff failed to satisfy the second element of the prima facie case. *Id.* at 944. The Eighth Circuit reversed the district court by commenting that its ruling was "analytically flawed for several reasons." *Id.*

> First, recognizing that the prima facie case in discrimination cases varies somewhat with the specific facts of each case, we believe that the second element in the present case should have been phrased in terms of whether plaintiff was "qualified' for his position. Second, by requiring plaintiff to disprove the alleged conduct violation in order to establish his prima facie case, the district court essentially required plaintiff, at the outset, to disprove defendant's alleged business reasons for its adverse employment action – in

other words, to prove pretext and the ultimate issue of intentional discrimination. The prima facie burden is not so onerous. Third, taken to its logical extreme, the district court's reasoning could have ended the inquiry prematurely, thus denying plaintiff the opportunity to show that, even if these incidents did occur, defendant unlawfully responded by treating plaintiff differently from others who were similarly situated, on account of his race. We hold that plaintiff did show that he was qualified for the teaching and coaching positions which he had held for several years, and that he therefore met his burden establishing the second element of his prima facie case, at least to the extent necessary to withstand a motion for summary judgment.

Id. (internal citations omitted).

However, several years later the Eighth Circuit utilized a different approach. In *Miller v. Citizen's*

Security Group, Inc., 116 F.3d 343 (8th Cir. 1997) the Eighth Circuit interpreted the second element to require the plaintiff to show that he was performing his job at a level that met his employer's legitimate expectations. *Miller*, 116 F.3d at 346-47. The Eighth Circuit affirmed the granting of summary judgment on the grounds that the plaintiff failed to present a prima facie case by concluding that it was proper for the district court to have relied on the defendant's proffered reasons for the plaintiff's discharge to determine whether the plaintiff was performing his job at a level that met his employer's legitimate expectations. *Id.*

Another Circuit also appears to have an internal conflict on this issue. The Seventh Circuit in *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986) rejected a defendant's attempt to use the reason for discharge to defeat the plaintiff's prima facie case. The Seventh Circuit stated that the defendant's attempt to do so:

overlooks the role of establishing a prima facie case in sequence of proof involved in a discriminatory discharge case. Proof of a prima facie case does no more than entitle the plaintiff to an inference of discrimination; it is not equivalent to a factual finding to that effect. [The plaintiff's] testimony that the general quality of his work was satisfactory is sufficient to establish that he met the legitimate expectations of his employer, and hence, to satisfy that element of the prima facie case. The burden then shifted to [the defendant] to rebut the inference of discrimination by articulating a legitimate, non-discriminatory explanation for discharging [the plaintiff]. Such an explanation is not, however, appropriately brought as a challenge to the sufficiency of [the plaintiff's] prima facie case."

Yarbrough, 789 F.2d at 512 (internal citations omitted).

However, the Seventh Circuit did not follow its reasoning from *Yarbrough* when it reviewed a grant of summary judgment in *Hong v. Children's Memorial Hospital*, 993 F.2d 1259 (7th Cir. 1993) *cert. denied, 511 U.S. 1005 (1994)*, only two years later. In *Hong*, a hospital relied upon the annual performance evaluation scores to support the firing of one of its employees. *Hong*, 993 F.2d at 1262. The employee sued under Title VII. The district court granted summary judgment and the Circuit Court affirmed by holding that because the plaintiff was unable to show she was performing adequately, as illustrated by her performance evaluations, she failed to establish a prima facie case. *Id.*

In sum, the holdings in *Davenport* and *Miller* and in *Yarbrough* and *Hong* cannot be harmonized and this illustrates an internal conflict within the Eighth and Seventh Circuits respectively.

In this case, Bloom provided the district court with evidence that he was qualified and performing his

job satisfactory. The undisputed evidence before the district court showed that Bloom is a Registered Nurse, licensed by the state of Connecticut, and therefore qualified for the job he was performing and was also hired to perform. In addition, Bloom's final evaluation before his termination stated he was performing satisfactory. However, the district court improperly relied on the reasons for Bloom's termination in ruling that Bloom failed to show he was performing satisfactorily as required by the second element of a prima facie case.

A review of the case law illustrates that there exists a conflict on this issue amongst the Circuit Courts and there is even an internal conflict within two Circuits. This Court should therefore grant certiorari to resolve the conflicts and define once and for all the second element of a prima facie case of discrimination first enunciated in *McDonnell Douglas*.

Issue #2

The district court in granting defendant's motion for summary judgment concluded that Bloom did not present a prima facie case for the additional reason that he "has not demonstrated that the circumstance surrounding his termination give rise to an inference of discrimination." App. C at 14a. However, in holding that Bloom did not satisfy the fourth element of a prima facie case, the district court ignored the **minimal** showing required at this stage of the *McDonnell Douglas* burden shifting analysis.

This Court stated in *Texas Dep't of Community Affairs v. Burdine* that "[t]he burden of establishing a prima facie case ... is not so onerous." 450 U.S. 248, 253, 101 S.Ct. 1089, 1094 (1981), and the Court has described the requirements of a prima facie case as "minimal." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 2746-47 (1993). However, it

appears that the district court has equated Bloom's burden under the fourth element of the prima facie case as the same as his ultimate burden of proving that he was discriminated because of his sex and race. This is in violation of the dictates of this Court's holdings in *McDonnell Douglas* and *Burdine*. The Second Circuit Court of Appeals interpreted the holdings of *McDonnell Douglas* and *Burdine* regarding the prima facie case as follows:

> A plaintiff alleging discrimination can satisfy the prima facie case and avoid dismissal at the conclusion of the plaintiff's direct case *without* submitting evidence sufficient to support a finding in his favor on each element that the plaintiff must ultimately prove to win. The burden-shifting presumption excuses the plaintiff *at that stage* from showing that discrimination was present and caused adverse employment action plaintiff suffered. If the plaintiff submits

> evidence of the minimal elements of the special discrimination prima facie case – membership in the protected class, qualification, adverse employment action, and preference for someone outside the protected class – the remaining elements (discrimination and causation) are presumed at this stage of the litigation, and defendant must take up the burden of going forward.

Fisher v. Vassar College, 114 F.3d 1332, 1336-37 (2d Cir. 1997) *cert. denied,* 522 U.S. 1075 (1998).

In this case, Bloom met his "minimal" showing by presenting the admitted fact that a black female nurse committed the same medication omissions as Bloom yet she was not terminated or even cited. This demonstration of unequal treatment is certainly a "circumstance" that creates an inference of discrimination at the prima facie stage.

Furthermore, it is important to note that the district court stated that Bloom did not "demonstrate that the circumstances surrounding his termination give rise to an inference of discrimination." App. C at ~~8a~~ 14a (emphasis added). However, in opposing a motion for summary judgment Bloom is not obligated to demonstrate or prove anything; he is only required to show that material facts are in dispute that require a trial to resolve. "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied." Fed. R. Civ. Pro. 56(e) – 1963 advisory committee notes. Suprisingly, the district court cited the undisputed fact that a black female nurse committed the same medication error that caused Bloom's termination, yet she was not terminated, however it failed to recognize this fact as an inference of discrimination. This is clearly contrary to the summary judgment standard in which all inferences and ambiguities should be resolved in the non-moving

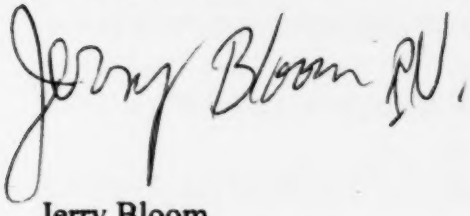
party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If the district court is allowed on the summary judgment motion to weigh evidence and draw its own references from the facts, then a serious violation of an individual's right to a jury trial under the Seventh Amendment to the United States Constitution will occur.

Therefore, the district court's ruling as to this issue is contrary to the established principles of *McDonnell Douglas* and *Burdine* regarding the prima facie case of discrimination. The district court's ruling also illustrates that it exceeded its authority when deciding a motion for summary judgment by weighing evidence and drawing its own inferences from the facts, thus depriving a jury of its primary function. Accordingly, the petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Jerry Bloom
Petitioner Pro Se
135 Tunxis Hill Road
Fairfield, CT 06430
203-367-0087

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE

40 FOLEY SQUARE

NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of March two thousand.

Present:

Hon. AMALYA L. KEARSE

Hon. WILFRED FEINBERG

Hon. ROBERT D. SACK

CIRCUIT JUDGES,

Bloom

v. Docket No. 99-7763

Jewish Home

A petition for panel rehearing having been filed herein by Jerry Bloom

Upon Consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT

ROSEANN B. MACKECHNIE,

CLERK

By:"/s/ Beth J. Meador"

Beth J. Meador,

Administrative Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FERDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS ANY OR OTHER COURT IN A SUBSEQUENT STAGE IN THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of January.

Present: HONORABLE WILFRED FEINBERG,

HONORABLE AMALYA L. KEARSE,

HONORABLE ROBERT D. SACK,

Circuit Judges.

JERRY BLOOM,

Plaintiff-Appellant,

-v.- No. 99-7763

JEWISH HOME FOR THE ELDERLY OF FAIRFIELD COUNTY, INC.,

Defendant-Appellee.

Appearing for Appellant: Jerry Bloom pro se, Fairfield, Ct.

Appearing for Appellee: Hugh F. Murray III, Murtha, Cullina, Richter & Pinney, New Haven, Ct.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the record from the United States District Court for the District of Connecticut, and was argued by plaintiff pro se and by counsel for defendant.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Eginton's Ruling on Defendant's Motion for Summary Judgment, dated April 6, 1999. The undisputed record reveals, inter alia, errors made by plaintiff with respect to the administration of medication to patients residing at defendant's facility, and warnings given to plaintiff in the wake of those errors; the record contains no sufficient evidence from which a rational juror could infer that the termination of plaintiff's employment was the result of gender or racial discrimination.

We have considered all of plaintiff's contentions on this

appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT

KAREN GREVE MILTON, Acting Clerk

By:

"/s/ Lucille Carr"

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JERRY BLOOM, :

Plaintiff, :

v. : No. 3:98cv00122 (WWE)

JEWISH HOME FOR THE :

ELDERLY OF FAIRFIELD :

COUNTY, INC., :

Defendant. :

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case arises out of plaintiff's employment termination by the defendant. Specifically, plaintiff claims that the defendant discriminated against him on the basis of sex and race in violation of Title VII.

Defendant denies the allegations and moves for summary judgment. For the following reasons,

defendant's motion for summary judgment will be GRANTED.

Background

Plaintiff, Jerry Bloom, is a Caucasian male who was formerly employed as a staff nurse by the defendant, Jewish Home for the Elderly of Fairfield County, Inc. ("Jewish Home"). As a staff nurse, Mr. Bloom was responsible for administering medication and supervising nursing assistants in the provision of comprehensive care.

During his nine month employment with Jewish Home, Mr. Bloom received verbal and written warnings concerning his poor nursing judgment and abrasive interaction with other staff. Mr. Bloom's supervisors submitted numerous notes to his personnel file documenting poor performance and an inability to cooperate with co-workers. Mr. Bloom also misused and damaged three pill crushers, which he claims to have replaced.

Most significantly, Mr. Bloom made errors concerning patient treatments. Mr. Bloom received warnings for administering an extra dose of an antibiotic to a patient and for omitting a patient's treatment. At one time, Mr. Bloom was also found to have improperly accounted for Jewish Home's narcotics supply when it was his responsibility to keep track of the narcotics strong box. Mr. Bloom states that he had handed the strong box key to an unidentified nurse who needed medicine for a patient that evening.

Jewish Home provided Mr. Bloom with counseling concerning his medication errors and advised him that another error would result in his termination.

On December 17, 1996, Mr. Bloom made another error by failing to administer medication called Rimantadine to nine elderly patients. Mr. Bloom was terminated the next day.

The nurse who relieved him on the evening of December 17th, a black female, also did not administer

the Rimantadine to the nine patients. She was not terminated.

Based on his termination, Mr. Bloom brought this complaint alleging discrimination based on sex or race. He admits that no one at Jewish Home ever made a comment related to his race or sex.

Discussion

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849, 116 L. Ed. 2d 117, 112 S. Ct. 152 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in

dispute. American International Group, Inc. v. London American International Corp., 664 F.2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. Celotex Corp., 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. Anderson, 477 U.S. at 249.

Mr. Bloom claims disparate treatment case by Jewish Home because it did not terminate the black, female nurse who relieved him on the evening of December 17, 1996.

When a plaintiff bringing a disparate treatment case is unable to establish the employer's reasons motivating the employment decision, the court must analyze the claim according to the burden shifting process established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). To establish a prima facie claim, the plaintiff must demonstrate that (1) he belongs to a protected class; (2) he was performing his or her duties satisfactorily; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Although the plaintiff's initial burden is not onerous, he must show that his termination was not made for legitimate reasons. Thomas v. St. Francis Hospital and Medical Center, 990 F. Supp. 81, 86 (D. Conn. 1998).

If the plaintiff establishes a prima facie case, the defendant must articulate a legitimate, non-discriminatory business reason for the alleged discriminatory action. The plaintiff must then prove by a preponderance of the evidence that the supposed legitimate reason is actually a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).

In this instance, Mr. Bloom's termination does not give rise to an inference of discrimination. The undisputed facts establish that Mr. Bloom had serious performance problems concerning patient treatment and interaction with other staff. Mr. Bloom's termination arose out of his failure to correct his performance problems despite Jewish Home's efforts to provide him with counseling. Even taking all of the inferences of fact in his favor, the undisputed evidence establishes that Mr. Bloom was not performing his job satisfactorily.

Furthermore, Mr. Bloom has offered no evidence that

the black, female nurse who was not terminated had a comparable employment history of warnings, disciplinary problems, medication errors and difficulty with staff interaction.

Therefore, Mr. Bloom has not demonstrated that the circumstances surrounding his termination give rise to an inference of discrimination. The Court will grant defendant's motion for summary judgment.

Conclusion

For the foregoing reasons, defendant's Motion for Summary Judgment [Doc. No. # 11] is GRANTED. The Clerk is directed to close this case.

SO ORDERED.

"/s/ Warren W. Eginton"

Warren W. Eginton, Senior U.S. District Judge

Dated at Bridgeport, Connecticut this 6th day of April, 1999.